No. 79-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Following the dismissal in district court of seven separately filed, unconsolidated actions against defendants, respondent — the plaintiff in one of the actions — followed a deliberate, calculated strategy not to appeal from the judgment dismissing his complaint but instead to refile essentially the same complaint in another forum.

The question presented is whether respondent can evade the res judicata effects of the unappealed dismissal of his first complaint merely because the plaintiffs in certain of the other actions did appeal and obtained a reversal of their own dismissals based on a subsequent decision of this Court in an unrelated case.*

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* Saks & Company has two nonwholly owned subsidiaries, 9230 Corporation and 12 W. 48th Street Corporation. Saks & Company is owned by Gimbels-Saks Retailing Corporation, which is owned by Brown & Williamson Tobacco Corporation, which is owned by Brown & Williamson Industries Incorporated, which is owned by BATUS Inc., which is owned by South Western Nominees Ltd., which is owned by B.A.T. Industries Ltd. Gimbels-Saks Retailing Corporation has two other subsidiaries which are, accordingly, affiliates of Saks — Gimbel Brothers, Inc., and Thimbles Specialty Stores, Inc. Subsidiaries of the other parent companies named above include The Kohl Corporation, Germaine Monteil Cosmetiques Corporation, Appleton Papers Inc., Montage Laboratories Inc., Tuvache Inc., Superior Cosmetics Inc., Beebe & Sons and Overseas Tobacco Corporation.

Federated Department Stores, Inc., has no parent, nonwholly owned subsidiaries or affiliates, within the meaning of Supreme Court Rule 28.1.

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Respondents.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The original opinion of the court of appeals (J.A. 195) is unreported. The substituted opinion of the court of appeals (J.A. 215) is reported at 611 F.2d 1267 (9th Cir. 1980). The opinion of the district court (J.A. 187) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1979. A timely petition for rehearing was denied on January 2, 1980. The petition for certiorari was filed on March 28, 1980, and the petition was granted on November 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATEMENT OF THE CASE

The present case was one of seven purported class actions for treble damages and attorneys' fees — and one of two such actions filed by the same attorney — which promptly followed and substantially copied antitrust charges filed against petitioners by the federal government.[1] Respondent's complaint differed from the other private actions and the government suits by alleging a conspiracy in Southern, rather than Northern, California and seeking relief on behalf of customers residing in that locality. As discussed in more detail below, this was part of a calculated strategy followed by respondent's counsel throughout the course of this litigation to separate his actions from the others. The issue of the applicability of res judicata in the context of the efficient administration of complex class action litigation, presented here, arises as a direct result of this deliberate strategy.

A. The Filing, Litigation and Dismissal of the First *Brown* Complaint

On April 28, 1976, following a federal grand jury investigation, the United States filed a misdemeanor indictment and a civil injunctive action in the United States District Court for the Northern District of California charging that petitioners had violated Section

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[1] Both of the cases filed by respondent's attorney, *Brown* v. *Federated Dept. Stores, Inc., et al.*, and *Moitie* v. *Federated Dept. Stores, Inc., et al.*, were the subjects of the Petition for Certiorari. However, subsequent to the filing of the Petition, the *Moitie* case was voluntarily dismissed. (J.A. 221.) *See* Petitioners' Supplemental Memorandum, filed in this Court on May 28, 1980. Therefore, only the *Brown* case is currently pending before this Court.

1 of the Sherman Act, 15 U.S.C. §1 (1976), by agreeing to fix the retail prices of women's clothing sold by them in Northern California from 1963 until April 1974.[2] Promptly thereafter, seven purported class actions for treble damages, attorneys' fees and other relief were filed against petitioners on behalf of variously defined proposed classes of retail purchasers of women's clothing. Each of these complaints was substantially a verbatim copy of the government's pleadings, except that the *Brown* complaint related to a different locality, Southern California. Each alleged that petitioners had conspired to fix the retail prices of women's clothing sold by them between 1963 and April 1974 and that the alleged class members were injured by having been overcharged for the women's clothing they purchased from petitioners during that period. The actions were not consolidated. They were assigned to a single judge in the United States District Court for the Northern District of California under the local related-case rule. Rule 205-2(b) (N.D. Cal.).

Notwithstanding the common origins and substantially identical allegations of all seven complaints, respondent's counsel from the outset followed a consistent pattern of attempting to differentiate his two cases ("the *Brown* and *Moitie* cases") from the other five ("the *Weinberg* cases").[3]

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[2] *United States* v. *Federated Dept. Stores, Inc., et al.*, No. CR-76-236-SAW (N.D. Cal.) (indictment); *United States* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-858-RHS (N.D. Cal.) (civil action). The criminal action terminated with the entry of nolo contendere pleas by both petitioners. The government civil action was concluded by the entry of a consent judgment against Federated and the dismissal of Saks.

[3] The other five actions in the Northern District of California are *Weinberg* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-867-SW

Unlike the previously filed *Weinberg* actions, the first *Moitie* complaint ("*Moitie I*") was filed in a state court — the California Superior Court for Santa Clara County — from which it was removed by petitioners on grounds of diversity of citizenship and federal question jurisdiction. (R. 9.)[4] The *Moitie I* complaint tracked almost verbatim the essential allegations of the government's complaint charging a price-fixing conspiracy in Northern California, except that it referred solely to state law. The complaint sought treble damages under the Cartwright Act, California's antitrust statute. CAL. BUS. & PROF. CODE §16720 (West 1964). (R. 13-14.) The complaint also asked for an injunction against petitioners' alleged "unfair business practices" under CAL. CIV. CODE §3369 (West 1970). (R. 17.)

The same attorney who filed *Moitie I* filed the first *Brown* complaint ("*Brown I*") a few weeks later in the federal court for the Northern District of California. (J.A. 9.)[5] This complaint, alleging a violation of Sherman Act, Section 1, and seeking treble damages, attorneys' fees and injunctive relief, also almost entirely replicated the allegations in the government complaints. However, totally unlike the government complaints and

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and *Eisenberg, et al.* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-869-SW (both filed on April 29, 1976); and *Musser* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-1363-SW (removed from the Superior Court of San Francisco); *Morgan* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-1429-SW; and *Kimmel, et al.* v. *Sommerfield, et al.*, No. C-76-1671-SW (filed between June 11 and August 9, 1976).

[4] *Moitie* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-1110-SW (filed Super. Ct., Santa Clara Cty., May 6, 1976; removed to N.D. Cal., June 1, 1976).

[5] *Brown* v. *Federated Dept. Stores, Inc., et al.*, No. C-76-1210-SW (N.D. Cal., filed June 15, 1976).

the *Weinberg* cases, *Brown I* alleged a conspiracy to fix prices in Southern, not Northern, California. Brown's counsel filed a Notice of Related Cases under the local court rule, L.R. 205-2(b), *supra*, resulting in the assignment of his Southern California case to the same judge coordinating the six related Northern California cases.[6]

On July 23, 1976, petitioners moved to dismiss all the pending complaints for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (J.A. 37.) The principal ground for the motion was that plaintiffs, as retail purchasers, were not injured in their "business or property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976). Petitioners also argued that the complaints seeking injunctive relief, including *Brown I*, failed to state a claim under Section 16 of the Clayton Act, 15 U.S.C. §26 (1976), because they did not allege irreparable injury and otherwise failed to satisfy the prerequisites for injunctive relief. In addition, petitioners argued that the complaints, including *Moitie I*, which purported to rely on state law, should also be dismissed because the same "business or property" and equitable relief standards applied under California law.

Respondent's counsel filed a brief in opposition to the motion to dismiss, with respect both to damages and

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[6] In this Notice, respondent's counsel stated that *Brown I* was filed "by error" in the Northern District of California. Counsel further stated that "while they have no overriding desire for the case to be tried in" the Central District, that forum was their "first choice." Counsel invited the court either to schedule arguments on transferring the case or to coordinate the case with the other pending private actions against petitioners. The court adopted the latter course of action. (We are lodging with the Clerk of this Court a copy of this Notice and Related Case Order, which were inadvertently omitted from the certified record in the court below.)

injunctive relief (J.A. 41); he participated in oral argument on the motion; and, in other ways, he actively engaged in litigation in *Brown I* and *Moitie I* in the federal court,[7] until those actions were dismissed.

On January 11 and 13, 1977, the district court dismissed "in its entirety" each of the seven complaints, including *Brown I* and *Moitie I*, and entered final judgments for petitioners. (J.A. 88, 90, 91.) The court held that the complaints failed to state valid claims for treble damages on the ground that retail purchasers were not persons injured in their "business or property" under Clayton Act, Section 4, 15 U.S.C. §15 (1976). (J.A. 85, 88.) The court further held that, while retail purchasers were eligible to seek an injunction under Clayton Act, Section 16, 15 U.S.C. §26 (1976), the complaints failed to establish a basis for awarding equitable relief. (J.A. 88.)[8]

Following their dismissal, five of the seven cases — the *Weinberg* cases — were appealed to the United States Court of Appeals for the Ninth Circuit. Moitie and Brown deliberately chose not to appeal from the final judgments dismissing their complaints. Instead, their counsel again sought to disassociate his cases from the others and to pursue a different course.

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[7] Respondent's counsel filed replies to the counterclaims served in both *Brown I* (J.A. 29, 33) and *Moitie I* (R. 60, 65). He served discovery requests and argued in opposition to a time extension request in *Moitie I*, and he filed a related case notice and other procedural documents in *Brown I*. (*See, e.g.*, J.A. 1-4; R. 30-31.)

[8] The opinion of the district court is reported at 426 F. Supp. 880 (N.D. Cal. 1977).

B. The Filing and Dismissal of the Second *Brown* Complaint

On February 13 and 17, 1977, shortly after the expiration of the time for appeal, Moitie and Brown, still represented by the same counsel, filed second complaints ("*Brown II*" and "*Moitie II*") — which were in all material respects verbatim copies of their first complaints — in the Municipal Court for the Palo Alto-Mountain View Judicial District. (J.A. 93; R. 167.) Petitioners removed these actions to the federal court for the Northern District of California,[9] and filed notices of related cases stating that *Brown II* and *Moitie II* were related to *Brown I* and *Moitie I*. (J.A. 103.) Respondent did not oppose these notices, and the cases, while still not consolidated, were assigned to the same judge who had previously heard all seven of the original private actions. (J.A. 107.)

In all essential respects, *Brown II* and *Moitie II* are identical to *Brown I* and *Moitie I*. As both courts below found, the second complaints alleged the same claim as the first complaints. Like their respective predecessors, *Brown II* alleged a conspiracy in Southern California while *Moitie II* alleged the same Northern California conspiracy involved in the government and *Weinberg*

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[9] In addition to basing removal on diversity of citizenship and general federal question jurisdiction, petitioners also removed the second actions on the ground that their filing presented issues as to the scope and possible circumvention of a federal court judgment, which itself raised a federal question within the district court's jurisdiction. *See Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941); *Stoll* v. *Gottlieb*, 305 U.S. 165, 167, 171 (1938); *Villareal* v. *Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976).

cases. The following allegations of the second complaints are, with a few minor exceptions, *verbatim copies* of the allegations of the first complaints:[10]

(i) Class action allegations;

(ii) Description of the plaintiffs;

(iii) Description of the defendants;

(iv) Description of unnamed parties;

(v) Description of agents and co-conspirators;

(vi) Description of the trade and commerce allegedly affected;

(vii) Statement of the "offenses charged," *i.e.*, the basic allegations of the alleged wrong committed by defendants against the plaintiffs;

(viii) Statement of the alleged "effects" of the defendants' alleged offenses;

(ix) Statement of the alleged injury to the plaintiffs; and

(x) Allegations of fraudulent concealment.

The asserted primary difference between complaints I and complaints II was that the latter purported to state four legal theories of recovery which had not been expressed in precisely the same terms in *Brown I* and *Moitie I*: "fraud and deceit," "unfair business practices," "civil conspiracy" and "restitution of moneys had and received." (J.A. 99-101; R. 174-76.) However,

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[10] Citations to the specific portions of the *Brown II* and *Moitie II* complaints in which these various allegations appear are set forth in Appendix A hereto, together with citations to the parallel portions of the *Brown I* and *Moitie I* complaints.

all these theories were predicated on the same basic factual allegations copied from *Brown I* and *Moitie I*, namely, that the defendants had conspired to fix the prices of women's clothing causing the plaintiffs and the respective class members they purported to represent to overpay for the clothing they purchased from the defendants during the period of the conspiracy.[11]

Like the first complaints, the second complaints also sought damages, attorneys' fees and costs. In lieu of an express request for treble damages, the second complaints requested "appropriate multiple damages, and exemplary and punitive damages" with interest. (*Compare* J.A. 15 *and* R. 16-17 *with* J.A. 101-02 *and* R. 176-77.)

On April 8, 1977, petitioners moved to dismiss *Brown II* and *Moitie II* on grounds of res judicata. (J.A. 109.) Relying upon the judgments dismissing *Brown I* and *Moitie I*, from which no appeal was taken, peti-

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[11] The differences between these asserted "new" theories and those expressed in complaints I are difficult to discern. Complaints II alleged that petitioners fraudulently represented that their prices were "not pursuant to a price fixing scheme as hereinbefore charged" (J.A. 99; R. 174); whereas complaints I alleged that petitioners fraudulently "took measures to conceal . . . the violations hereinabove alleged." (J.A. 14; R. 15.) The charge of an "unfair business practice" in complaints II (J.A. 100; R. 175) parallels the charge in *Moitie I* of a violation of the California "unfair business practices" act, CAL. CIV. CODE §3369 (West 1970). (R. 17.) The "civil conspiracy" theory of complaints II — *i.e.*, that petitioners illegally fixed prices pursuant to a conspiracy (J.A. 100; R.175-76) — was also expressly alleged in complaints I. (J.A. 13; R. 13-14.) Finally, the restitution theory in complaints II rests on the allegation that petitioners wrongfully retained plaintiffs' money "[b]y reason of the effectiveness of the aforesaid conspiracy . . . ." (J.A. 101; R. 176.) The same basic allegations — that plaintiffs had to overpay for purchases as a result of the alleged conspiracy — were made in *Brown I* and *Moitie I*. (J.A. 13-14; R. 15.)

tioners argued that respondent could not circumvent those judgments by refiling essentially identical complaints in another forum. The district court agreed.

In an order filed July 6, 1977, the court, following "an extensive review and analysis of the origins and substance of these complaints" (J.A. 187), found that the first and second complaints filed by Brown and Moitie were of "similar identity." (J.A. 192.) The district court observed (J.A. 189):

> The new complaints are against the same defendants, allege the same unlawful act (engaging in a price fixing conspiracy) during the same time period (1963 to April, 1974), are brought on behalf of essentially the same classes of plaintiffs as the previous complaints, and incorporate the same "Trade and Commerce," "Offenses Charged," and "Effects," allegations contained in the government complaint and indictment.

The district court held that, under the doctrine of res judicata, plaintiffs' failure to appeal the dismissals of *Brown I* and *Moitie I* barred their attempt to evade the court's prior judgments by relitigating their claims in the guise of *Brown II* and *Moitie II*.[12] This time, Brown and Moitie appealed to the Ninth Circuit.

C. Subsequent Proceedings in the *Weinberg* Cases

During the pendency of the appeals in *Brown II* and *Moitie II*, this Court decided *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979). In that case, reversing a decision of

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[12] The district court also denied plaintiffs' motion to remand *Brown II* and *Moitie II* to the municipal court. The court of appeals expressly affirmed this decision. (J.A. 217.) This aspect of the decision below is not involved here.

the Eighth Circuit, the Court held that retail purchasers may be injured in their "business or property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976). On this basis, the Court of Appeals for the Ninth Circuit reversed the dismissal of the *Weinberg* cases and remanded them to the district court.[13]

Following remand, the *Weinberg* cases were consolidated in the district court pursuant to Fed. R. Civ. P. 42(a), a consolidated amended complaint was filed, and active pretrial litigation ensued until the parties agreed to settle the case.[14]

D. The Court of Appeals' Decision in *Brown II* and *Moitie II*

On November 15, 1979, the court of appeals issued a memorandum decision, labeled "Do Not Publish," reversing the district court's dismissal of *Moitie II* and *Brown II*.[15] Noting that "[t]his appeal presents a complex and novel issue related to the doctrine of *res judicata* . . ." (J.A. 195), the court acknowledged that "[a] strict application of the doctrine of *res judicata* would preclude our review of the instant decision." (J.A. 198.) Nevertheless, the court concluded that "[b]ecause the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed." (J.A. 199.)

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[13] *Weinberg* v. *Federated Dept. Stores, Inc., et al.*, No. 77-1547 (9th Cir. June 25, 1979) (order reversing and remanding).

[14] *In re West Coast Department Store Antitrust Litigation*, No. C-79-2724-SW (N.D. Cal. Oct. 7, 1980) (order approving consent judgment).

[15] Although designated as not for publication, the court's decision was reported in summary fashion in Trade Regulation Reports Newsletter (CCH) No. 414 at 4 (December 3, 1979), and the Antitrust and Trade Regulation Report (BNA) No. 941 at A-4 (November 29, 1979).

On November 29, 1979, petitioners filed a petition for rehearing (J.A. 201) noting that the parties had not been asked to brief or argue the "novel and complex" res judicata issue on which the court based its reversal.[16] The petition argued that the court of appeals' ruling was in conflict with the controlling decisions of this Court and other courts of appeals. On January 2, 1980, the court denied the petition for rehearing. (J.A. 213.)

On January 15, 1980, the court of appeals withdrew its prior memorandum disposition and substituted an opinion that reached the same result. In the substituted opinion, the court of appeals reiterated the statements quoted above regarding the res judicata issue. (J.A. 215, 218, 220.) In addition, relying on three state court decisions, the court held that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." (J.A. 218.) The court held that — even though the plaintiffs in *Moitie I* and *Brown I* had deliberately chosen not to appeal and sought to circumvent the district court's judgment by filing duplicative actions in another forum — it "could have reversed" *Moitie I* and *Brown I* at the same time as it reversed the *Weinberg* cases. (J.A. 219.) On this basis, the court of appeals sought to distinguish this Court's decision in *Reed* v. *Allen*, 286 U.S. 191 (1932), which held that a party who fails to appeal from an adverse judgment cannot escape the res judicata effects of that judgment even if a closely related judgment — in *Reed*, a judgment involving the same parties and the

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[16] We respectfully note that, contrary to the statement in footnote 2 to the court of appeals' opinion (J.A. 217), the parties did brief the *general* issue of res judicata. *See* Brief of Appellees at 2, 11-12, 27-39. We are aware of no "invitation" to brief the specific issues on which the court of appeals based its decision.

issue of entitlement to the same property — is subsequently reversed on appeal. The court stated that "[t]he other [Supreme Court and court of appeals] cases cited by . . . [petitioners] are similarly distinguishable." (J.A. 219.)

Following the remand to the district court, and prior to the grant of certiorari by this Court, the complaint in *Moitie II* was voluntarily dismissed, pursuant to Fed. R. Civ. P. 41(a)(1) and 23(e). (J.A. 221.) *See* Petitioners' Supplemental Memorandum, filed in this Court on May 28, 1980, and Appendix A thereto. Petitioners filed answers and counterclaims in *Brown II*, and respondent filed replies to those counterclaims. Further proceedings in *Brown II* have been stayed in the district court pending the decision of this Court.

SUMMARY OF ARGUMENT

Respondent filed one of seven purported class action complaints generated by a federal government antitrust action against petitioners. When all seven cases were dismissed and the other plaintiffs appealed, respondent made a deliberate tactical decision not to appeal the dismissal of his complaint but instead to file another essentially identical complaint in another forum. The court of appeals recognized that, if it were to consider respondent's case standing alone, "strict application of the doctrine of *res judicata*" would require dismissal of the duplicative complaint. (J.A. 218.) Nevertheless, the court held that respondent could escape res judicata and resurrect his dismissed action solely because the *unrelated plaintiffs* in the *other independent actions* had obtained reversals on *their* appeals. This decision, if allowed to stand, would create a gaping exception to res judicata in the very class of cases — multiple actions

with multiple parties such as typically follow in the wake of certain government complaints — where its stabilizing influence is most acutely needed.

I.

As both courts below found, all the well-established criteria for the application of res judicata were satisfied in this case. The dismissal of *Brown I* was a final judgment on the merits by a court of competent jurisdiction. Respondent's second complaint was almost entirely a verbatim copy of its predecessor. Both complaints involved the identical parties and alleged, in identical language, the same violation of the same primary right of respondent resulting in the same injury — *i.e.*, a conspiracy to fix the prices of women's clothing between 1963 and April 1974 resulting in overcharges.

The substantial identity of the claims was not altered by respondent's assertion in *Brown II* of four theories of recovery which, while echoing the allegations in *Brown I*, had not been expressed in precisely the same terms in the earlier complaint. After "extensive review and analysis of the origins and substance of these complaints" (J.A. 187), the district court found, and the court of appeals expressly agreed, that these cosmetic variations did not alter the essential character of the claim in the second complaint, which was identical to that in the first. It is well settled that a plaintiff may not relitigate the same claim, against the same defendants, based on the same operative facts, merely by an ostensible change in legal theories.

Nor were the res judicata consequences of the dismissal of *Brown I* altered by this Court's subsequent decision in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330

(1979), *rev'g* 579 F.2d 1077 (8th Cir. 1978), which rejected the statutory interpretation upon which the dismissal of *Brown I* was partially based. This Court has repeatedly held that a final, unappealed judgment on the merits is res judicata regardless of whether the judgment was right or wrong, and that it retains its res judicata effect even if the legal principle upon which it rested is overruled in another case.

II.

The exception to the "strict application" of res judicata adopted by the court of appeals — based on three state court cases holding "that non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties" (J.A. 218) — cannot validly be applied here.

1. The purported exception contravenes the basic purposes of res judicata to avoid the cost and vexation of multiple lawsuits, conserve judicial resources and encourage reliance on adjudication. As this Court has made clear, there is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946).

Moreover, the decision below squarely conflicts with the prior decisions of this Court on the precise issue. In *Ackermann* v. *United States*, 340 U.S. 193 (1950), and *Reed* v. *Allen*, 286 U.S. 191 (1932), this Court held that a judgment does not lose its res judicata effect as a result of a subsequent inconsistent appellate decision in another case — even if the cases are intimately interrelated. There are even more compelling reasons for strict adherence to res judicata here than there were in *Ackermann* and *Reed*, since none of the mitigating cir-

cumstances which might have supported a relaxation of the rule in those cases are present here.

If the exception to res judicata carved out by the court below were deemed permissible, then whenever a district court decision applied to a number of cases, only one party would have to appeal, leaving the others free to pursue other speculative or inconsistent courses of action, comfortable in the knowledge that they would still benefit from any reversal, notwithstanding their calculated avoidance of the court of appeals. As this court held in *Reed*, 286 U.S. at 199, "the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

2. In any event, even if the exception to res judicata adopted by the court of appeals were permissible in some cases, it would not avail respondent here. His claim was in no way "interwoven" — closely or otherwise — with those of the appealing plaintiffs in the other independent, separately filed actions. All the other complaints, like the government's, alleged violations solely in Northern California; whereas respondent alleged violations solely in Southern California — a separate market, with different stores operated by different personnel and with different alleged classes of customers.

From its inception, respondent studiously sought to keep his case separate from the other actions. Respondent ultimately broke away from the other cases entirely when he deliberately chose not to appeal from the dismissal of his first complaint. Having persistently pursued a basic strategy of keeping his case separate from the other actions, respondent is in no position to benefit

from the appeals in those cases on the ground that his case is "closely interwoven" with them.

The three state court cases relied upon by the court of appeals all involved parties with "interwoven" relationships — principal and agents, competing heirs, and successive purchasers of a single item of property — which in no way resemble the respective positions of respondent and the parties in the various Northern California cases. None of the state cases relied upon involved a multiplicity of discrete, separately filed actions; in each case, there was only a single lawsuit, to which all those who appealed as well as those who did not were parties. Moreover, unlike the present case, none of those cases involved any attempt to circumvent the court's jurisdiction and judgment by institution of a duplicate action.

III.

There is a special need for strict adherence to res judicata in complex, multiple actions, such as the present case, to serve as a check on abuses by counsel and to maintain judicial control. The inevitable piling on of multiple class actions following government antitrust complaints, and the attendant jockeying for position by the various attorneys involved, have created substantial problems in the administration of justice. Particular criticism has been leveled against the tactic, adopted by respondent here, of breaking away from the pack — *i.e.*, filing competing actions that differ in certain particulars from the government complaint with a view toward enhancing the nonconforming attorney's bargaining position with respect to settlement and attorneys' fees.

The appropriate antidote to such disruptive practices is effective judicial control, such as was exercised by the

district court here, and not the creation of loopholes in established doctrines of judicial administration, such as that wrought by the court of appeals. The decision below runs counter to the salutary trend toward reducing the burdens on parties and enhancing the court's ability to coordinate and control complex litigation, as manifested, for example, in the recent Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (September 12, 1980).

The court of appeals' decision is also inconsistent with the directives of this Court that, to avoid the problems of "administrative chaos, class-action harassment, or 'windfall' settlements" endemic in cases of the sort involved here, the district courts should "exercise sound discretion and use the tools available." *Reiter* v. *Sonotone Corp.*, 442 U.S. at 345. The doctrine of res judicata is one of the most firmly established "tools" for ensuring sound judicial administration, minimizing burdensome duplication, and redressing abusive tactical maneuvering. If allowed to stand, the decision below would undermine this basic doctrine.

ARGUMENT

The District Court's Final, Unappealed Judgment in *Brown I* Was Res Judicata and Required the Dismissal of *Brown II*.

This Court reaffirmed earlier this Term that the basic function of res judicata is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 49 U.S.L.W. 4015, 4017 (U.S. Dec. 9, 1980). Respondent's deliberate tactical decision — after actively litigating in the district court — not to appeal the dismissal of his

first complaint, but instead to start all over again by filing a duplicative complaint in another forum, offends this "fundamental precept" of orderly judicial administration. *See Montana* v. *United States*, 440 U.S. 147, 153-54 (1979).

As the court of appeals in this case correctly recognized, "[a] strict application of the doctrine of *res judicata* would preclude . . . [reversal] of the . . . [district court's] decision." (J.A. 218.) Simply stated: if *Brown I* had been the *only* private action filed against petitioners following the government's complaints, res judicata would unquestionably bar *Brown II*.

There is no justification for allowing respondent to evade the established principles of res judicata solely because five *other separate actions* were filed by *unrelated* parties who, unlike respondent, followed the orderly procedure of seeking direct appellate review of the judgments dismissing their complaints. Contrary to the decision below, there is no exception to res judicata permitting resurrection of unappealed judgments based on appellate decisions in "closely interwoven" cases, and, in any event, respondent's action was not "closely interwoven" with the *Weinberg* cases.

Indeed, scrupulous adherence to res judicata is even more important, not less so, for the maintenance of judicial effectiveness and economy in multiple actions, such as those involved here, which typically follow in the wake of certain types of government proceedings, and which inherently entail a substantial potential for unduly burdensome and vexatious litigation. *See Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979), and 442 U.S. at 345-46 (concurring opinion of Rehnquist, J.).

A. The Established Criteria for the Application of Res Judicata Were Fully Satisfied in This Case.

Respondent's counsel filed *Brown I* in the district court and actively engaged in litigation there. After that court dismissed his complaint, he made a conscious, tactical decision not to appeal the district court's final judgment. Instead, he filed a replica of his prior complaint in another forum. In short, he attempted to proceed in *Brown II* as if the prior litigation in the district court in *Brown I* had never taken place. But the law does not permit such legerdemain. Under well-settled principles of res judicata, the district court correctly held that the filing of respondent's second complaint was barred by the unappealed judgment dismissing its predecessor.

The governing standards of res judicata have been well defined:

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." [17]

As both courts below correctly held, these established criteria were fully satisfied in this case:

First, the district court that dismissed *Brown I* had jurisdiction over that action. (J.A 9.)

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[17] *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948) (quoting *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877)). *See Allen* v. *McCurry*, 49 U.S.L.W. at 4016; *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979); *Montana* v. *United States*, 440 U.S. at 153; *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Heiser* v. *Woodruff*, 327 U.S. 726, 733, 735 (1946).

Second, the judgment dismissing *Brown I* "in its entirety" (J.A. 90), from which no appeal was taken, was a "final judgment." *See* RESTATEMENT (SECOND) OF JUDGMENTS §41, Comment b at 3 (Tent. Draft No. 1, 1973); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

Third, the dismissal of *Brown I* for failure to state a claim under Fed. R. Civ. P. 12(b) (6), was a judgment "on the merits." *See Angel* v. *Bullington*, 330 U.S. 183, 190 (1947); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); 1B MOORE'S FEDERAL PRACTICE ¶ 0.409[1] at 1005 (2d ed. 1980); RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment d at 39 (Tent. Draft No. 1, 1973).

Fourth, the identical parties were involved in both *Brown I* and *Brown II*. (*Compare* J.A. 11-12 *with* J.A. 95.)[18]

Fifth, *Brown II* involved the same claim and covered the same time period and geographical area as *Brown I*. *See* App. A, *infra*. In both actions, respondent alleged that petitioners had engaged in a conspiracy "to raise, fix, maintain and stabilize prices" in the sale of women's clothing and that, as a result, respondent had "been forced to pay substantial overcharges on retail purchases of women's clothing." (*Compare* J.A. 13 *and* 14 *with* J.A. 97 *and* 98.) Both complaints alleged — in essentially identical language — "but a single wrongful

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[18] The cases not only involved the same plaintiffs and defendants, but also the same plaintiff's attorney who, in the circumstances presented, can well be viewed as the prime moving force and the real party in interest in this case. *See Report of the Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 195 (1976). *See also Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 338 (1980); 1B MOORE'S FEDERAL PRACTICE ¶ 0.411[6] n.14 at 1555 (2d ed. 1980). *Cf. Montana* v. *United States*, 440 U.S. at 153-55 (res judicata also applies to nonparty assuming control over litigation in which he has a financial interest).

invasion of a single primary right of the plaintiff." *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316, 331 (1927). *See Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464, 470 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).[19] The district court pierced the transparent camouflaging and rejected respondent's assertion that — notwithstanding its carbon-copy language — *Brown II* pleaded separate state claims not involved in *Brown I*. (*See* J.A. 192 ("From start to finish, plaintiffs have essentially alleged violations by defendants of federal antitrust laws.").) And the court of appeals specifically affirmed the finding "that the claims presented" in *Brown II*, like those in *Brown I*, "were federal in nature, arising solely from price fixing on defendants' part." (J.A. 217.)[20]

Finally, the allegations and theories stated in the complaint in *Brown II* already had been or could have been raised in *Brown I*. *See* note 11, *supra*. This Court has repeatedly held that a plaintiff cannot relitigate the

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[19] The definition of "the same claim" in RESTATEMENT (SECOND) OF JUDGMENTS §61(1) at 139 (Tent. Draft No. 5, 1978), is applicable to the essentially identical allegations of *Brown I* and *Brown II*:

> [T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

See also id. §61, Comment a at 140-42.

[20] The findings by the district court that had presided over all the litigation in *Brown I* and *II*, as to the essential character of the allegations of the complaints, were predicated on that court's "extensive review and analysis of the origins and substance of [the] complaints." (J.A. 187.) Such findings, which have been affirmed by the court of appeals, are not reviewed in this Court. *See Maher* v. *Gagne*, 100 S. Ct. 2570, 2575 (1980); *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 235 (1949).

same claim, against the same defendants, based on the same operative facts, merely by an ostensible change in legal theories. *Angel* v. *Bullington*, 330 U.S. at 192-93; *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. at 319-20; RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment d at 159 (Tent. Draft No. 5, 1978).[21]

The clear-cut res judicata consequences of the judgment dismissing *Brown I* were in no way altered by the fact that the decision therein rested, in part,[22] on a view of the law which was rejected — more than two years later — in this Court's decision in an unrelated case. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979), *rev'g* 579 F.2d 1077 (8th Cir. 1978). It has long been established that a final, unappealed judgment on the merits is res judicata regardless of whether the judgment was right or wrong, and it retains its res judicata effect even if the legal principle upon which it rested is subsequently overruled in another case. *See Angel* v. *Bullington*, 330 U.S. at 187; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor* v. *Deen*, 121 U.S. 525, 534 (1887).

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[21] As Mr. Justice Holmes stated in *United States* v. *California & Oregon Land Co.*, 192 U.S. 355, 358 (1904):

> [T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and, *a fortiori*, he cannot divide the grounds of recovery.

See also Scoggin v. *Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (final judgment "preclude[s] the assertion of every legal theory or ground for recovery that might have been raised."); *Johnson* v. *Dept. of Water and Power of the City of Los Angeles*, 450 F.2d 294, 295 (9th Cir. 1971), *cert. denied*, 405 U.S. 1072 (1972).

[22] The *Reiter* decision did not bear in any way upon the district court's dismissal of the various claims for injunctive relief.

As this Court held in *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. at 325, an "erroneous conclusion" reached by the court in the first suit

> cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata* . . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause.

See also Brownell v. *Chase National Bank*, 352 U.S. 36, 38-39 (1956).

The sound rationale for this rule was explained in *Reed* v. *Allen*, 286 U.S. 191, 201 (1932), as follows:

> The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.

The foregoing considerations confirm that the district court properly dismissed *Brown II* on the ground of res judicata. Neither this Court's subsequent decision in *Reiter*, nor, as we discuss below, any other subsequent development, can retroactively invalidate the district court's determination that *Brown II* is conclusively barred as a result of respondent's deliberate, tactical decision not to appeal from the final judgment dismissing the essentially identical complaint he filed in *Brown I*.

B. Successful Appeals by Unrelated Parties in the *Weinberg* Cases Do Not Relieve Respondent of the Res Judicata Effect of his Tactical Decision Not To Appeal the Final Judgment in *Brown I*.

Although the court of appeals acknowledged that "strict application of the doctrine of *res judicata*" required the dismissal of *Brown II* (J.A. 218), it carved out an exception to that doctrine in this case. The sole basis for this exception was the fact that — unlike respondent, who deliberately sought to bypass the adverse judgment in his case by refiling his action in another forum — the *Weinberg* plaintiffs had appealed the dismissal of their complaints and obtained a reversal based upon this Court's decision in *Reiter*. The court of appeals rationalized this exception in the opinion it substituted for its original memorandum disposition on the ground "that non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." (J.A. 218.)

This Court has made plain that there is no such exception to res judicata. The fundamental policies of fostering reliance on judgments and an end to litigation require that a party who makes a deliberate decision not to appeal from an adverse judgment is bound by that judgment, even if a closely related judgment is subsequently reversed on appeal. Moreover, even if there were such an exception as that adopted by the court of appeals, respondent's position in *Brown I* was in no way "interwoven" — closely or otherwise — with that of the parties in the *Weinberg* cases. Indeed, it was an integral part of respondent's strategy to differentiate his case from the other proceedings to the fullest extent possible, and he must bear the consequences of his litigation tactics.

1. There Is No Exception to Res Judicata Applicable to the Present Case.

It has long been established that "the doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). There simply is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata* . . . ." *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946). *See also Durfee* v. *Duke*, 375 U.S. 106, 111-12 (1963); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931).

The rejection of res judicata by the court of appeals here cannot be reconciled with the basic purposes of the doctrine to avoid the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *See, e.g.*, *Allen* v. *McCurry*, 49 U.S.L.W. at 4017; *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 329-30, 335-49 (1971). Indeed, the decision below directly conflicts with the prior decisions of this Court on the precise issue presented here. This Court has made clear that a judgment does not lose its res judicata effect as a result of a subsequent inconsistent appellate decision in another case — even if the cases are intimately interrelated.[23]

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[23] The decision below also conflicts with those of other courts of appeals holding that an adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issues involved is subsequently rendered in another case.

In *Ackermann* v. *United States*, 340 U.S. 193 (1950), three related individuals — a brother and sister and the sister's husband — had been ordered denaturalized on the ground that they had procured their naturalization by fraud. Their cases had been consolidated in the trial court, and the evidence was essentially the same for all three. Only the brother appealed; the Ackermanns did not appeal. After the brother won a reversal on his appeal, the government having stipulated that it had not presented sufficient evidence, the Ackermanns sought to reopen the judgments against them. They argued that, as reflected in the decision on the brother's appeal, the judgments were erroneous, and they offered various justifications for their failure to appeal. However, this Court refused to grant the requested relief.

The Court held that — in light of the Ackermanns' "voluntary, deliberate, free, untrammeled choice . . . not to appeal . . .," 340 U.S. at 200 — they were bound by the judgments against them, notwithstanding the fact that the result would have been different had they, like the brother, chosen to appeal. The Court stated that they "made a considered choice not to appeal" and "cannot be relieved of such a choice because hindsight

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See, e.g., Stewart Securities Corp. v. *Guaranty Trust Co.*, 597 F.2d 240, 241-42 (10th Cir. 1979); *De Filippis* v. *United States*, 567 F.2d 341 (7th Cir. 1977); *Lubben* v. *Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650-52 (1st Cir. 1972); *Barzin* v. *Selective Serv. Local Bd. No. 14*, 446 F.2d 1382, 1383 (3d Cir. 1971); *Annat* v. *Beard*, 277 F.2d 554 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960); *Collins* v. *City of Wichita*, 254 F.2d 837 (10th Cir. 1958); *Clouatre* v. *Houston Fire & Cas. Co.*, 229 F.2d 596, 597-98 (5th Cir. 1956); *Berryhill* v. *United States*, 199 F.2d 217 (6th Cir. 1952); *Appleton Toy & Furniture Co.* v. *Lehman Co.*, 165 F.2d 801, 802 (7th Cir. 1948); *Ripperger* v. *A. C. Allyn & Co., Inc.*, 113 F.2d 332, 333 (2d Cir.), *cert. denied*, 311 U.S. 695 (1940).

seems to indicate to [them] that [their] decision not to appeal was probably wrong." 340 U.S. at 198. The Court concluded that "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Id.*[24]

The doctrine that an adverse judgment not appealed is res judicata, regardless of its inconsistency with appellate decisions in other — even intimately related — cases, also formed the basis for this Court's decision in *Reed* v. *Allen*, 286 U.S. 191 (1932). That case involved a series of proceedings concerning disputed rights to certain real estate, the determination of which depended upon the construction of a particular will:

Case No. 1 — In the first action, the decedent's grandson ("A") and certain collateral relatives ("B") were required to interplead their claims for the rents collected on the disputed property. The trial court ruled that the property belonged to B under the will, and A appealed.

Case No. 2 — While the appeal was pending, B brought an action in ejectment against A to obtain a declaration of B's right to possess the property. Relying solely on the judgment in the first action, the trial court granted B the relief sought. A could have appealed, but chose not to do so.

Reversal of Case No. 1 — Subsequently, the appellate court reversed the decision in the first action,

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[24] The issue in *Ackermann* was raised on a motion for relief from judgment under Fed. R. Civ. P. 60(b), but the principles are fully applicable to a case, such as this, involving an attempt to relitigate a previously dismissed claim. Indeed, if a conscious decision not to appeal bars the discretionary relief available under Rule 60(b) to relieve cases of individual hardship, *a fortiori*, such a decision precludes an attempt to relitigate a dismissed claim.

which A had appealed, and held that A, not B, was the owner of the disputed property under the will and therefore entitled to the rents. The trial court then vacated its decree and directed payment of the rental money to A.

Case No. 3 — Following this appellate decision construing the will in his favor, A brought a suit against B for ejectment, claiming that he should have possession of the property.

This Court, reversing the court of appeals, held that A's action in Case No. 3 was barred, on grounds of res judicata, by virtue of the adverse decision in Case No. 2, which A had failed to appeal. Even though the judgment in Case No. 2 was based entirely on the judgment in Case No. 1, which was later reversed, the Court held that A's failure to appeal rendered the judgment in Case No. 2 a bar to his obtaining relief in the third suit. The Court stated:

> The judgment in the ejectment action [Case No. 2] was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. . . . *[I]t is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment.* If respondent, in addition to appealing from the decree [Case No. 1], had appealed from the judgment [in Case No. 2], the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton*, 141 U.S. 240 [(1891)]. But this course respondent neglected to follow.

286 U.S. at 198 (Emphasis supplied.).[25]

[25] In its substituted opinion, the court of appeals attempted to distinguish *Reed* and "[t]he other cases" cited by petitioners on the ground that in the *Weinberg* appeals the court "could have

The rights adjudicated in the successive *Reed* cases were certainly "closely interwoven" — the rights to collect rents on, and to recover possesion of, the same property, both dependent on the identical issue of the ownership. This Court's rigorous application of res judicata in that case, to the point of leaving one party in possession and the other party entitled to the rents, makes clear that there is *no* general equitable doctrine, contrary to the court of appeals' view, which permits an exception to the finality of a party's failure to appeal merely because his rights are "closely interwoven" with those of another party.

The case at bar presents even more compelling reasons for application of res judicata than did *Ackermann* and *Reed*:

First, there might have been a plausible justification for avoiding res judicata in *Ackermann* in order to relieve the petitioners from loss of citizenship, or in *Reed* in order definitively to resolve the issue of title to the disputed property, but no such justification exists here.

Second, the grandson's failure to appeal in *Reed* may have been caused by a mistaken belief that he had adequately protected his rights by his first appeal, and the failure to appeal in *Ackermann* was apparently based on lack of funds and the advice of a government agent. *See* 340 U.S. at 195-96. Here the failure to appeal was a

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reversed" the unappealed judgment in *Brown I*. (J.A. 219.) But this asserted distinction is flatly contrary to the rule in *Reed*, italicized in the text. *See Larson* v. *Straff*, 340 F.2d 180, 191 n.28 (3d Cir. 1964) (reversal not applicable to nonappealing party); *Annat* v. *Beard*, 277 F.2d 554, 558 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960) (same); *Whitehead* v. *American Security & Trust Co.*, 285 F.2d 282, 286 (D.C. Cir. 1960) (court of appeals has no jurisdiction to review portions of judgment relating to nonappealing party).

part of respondent's deliberate strategy to circumvent the district court's judgment, segregate his case from the other actions pending against petitioners, and refile his claim in camouflaged form in another court.

Finally, respondent here seeks to be the windfall beneficiary of an appellate reversal procured by other, independent parties, with no interest in respondent's case, not a reversal in an interrelated case, procured, as in *Reed*, by the same affected party or, as in *Ackermann*, by a close relative whose case was consolidated with that of the nonappealing parties.

If an exception to the doctrine of res judicata for sympathetic reasons was not deemed permissible in *Reed* or *Ackermann*, *a fortiori*, the overriding of so basic a doctrine surely is not permissible here.[26] If the law were otherwise, whenever a district court decision applied to a

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[26] The dissenting opinion in *Reed* provides no support for respondent's position here. The dissenters' basic position was that the established restitution principle — that property lost to a litigant under compulsion of a judgment should be restored to him if the judgment is reversed — should have applied to the tract of land that the grandson lost as a result of the subsequently reversed judgment in Case No. 1. 286 U.S. at 203. No such restitution remedy is applicable here. Moreover, in order to implement the restitution remedy, the dissenters, unlike the majority, would have ignored the res judicata effect of Case No. 2 because that action, which was not seriously opposed, was merely a device for enforcing the prior judgment which had erroneously determined the parties' respective property rights. In contrast, the case given res judicata effect here, *Brown I*, was vigorously opposed by respondent and was not predicated on an erroneous prior judgment involving the same claims and the same parties; rather, it was based on a view of the law which was later, in separate cases involving different claims and brought by unrelated parties, held to be incorrect. The dissenters in *Reed* acknowledged that, so long as it stood unreversed, the judgment in Case No. 1 — like that in *Brown I* — would have to be given res judicata effect, even if the court presented with the judgment believed it to be erroneous. 286 U.S. at 206-07.

number of cases, only one party would have to appeal. The other parties would be left free, and indeed encouraged, to pursue other inconsistent and speculative courses of action, relieved from risk, and comfortable in the knowledge that they would still benefit from any reversal, notwithstanding their calculated avoidance of the court of appeals. Multiple lawsuits in different forums would result, and the finality of judicial determinations, which the doctrine of res judicata seeks to secure, would be seriously jeopardized. In such circumstances, the "exception" to res judicata created by the court of appeals could swallow the rule.

There is nothing unjust in treating respondent's case differently from the *Weinberg* cases. Respondent purposely framed his suit differently from the outset. He was the only party to deviate from the government's complaints by alleging a conspiracy in Southern California, an entirely separate market from that alleged in the government and *Weinberg* cases. And he deliberately chose to pursue a separate tack from the other cases following dismissal of his first complaint. If the application of res judicata creates any hardship for respondent, it is the direct result of his own "voluntary, deliberate, free, untrammeled choice." *Ackermann* v. *United States*, 340 U.S. at 200. As this Court aptly noted in *Reed*, 286 U.S. at 198-99:

> The predicament in which respondent finds himself is of his own making, the result of an utter failure to . . . [appeal]. Having so failed, we can not be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in light of the maxim that the interest of the state requires that there be an end to litigation — a maxim which comports with common sense as well as public policy. And *the mischief which would*

follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. (Emphasis supplied.)[27]

2. *In Any Event, Respondent's Position Is Not Closely Interwoven With Those of the* Weinberg *Plaintiffs.*

The court of appeals relied on three state court decisions[28] to support the "exception" to res judicata that it applied here — *i.e.*, that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." (J.A. 218.) Even if the doctrine of res judicata admitted of such an exception, it would not avail respondent here. His claim was in no way "interwoven" — closely or otherwise — with those of the appealing *Weinberg* plaintiffs.

Each of the seven private actions against petitioners was separately filed by unrelated plaintiffs with independent interests. In contrast to the *Weinberg* plaintiffs who, copying the government's complaints, alleged a price-fixing conspiracy in Northern California and sought to represent a class of customers residing in that area, respondent alleged a different conspiracy, in *Southern* California (an area not referred to in the

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[27] *Accord, United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39, 41 (1950) ("If there is hardship in this case, it was preventable. . . . The case is therefore one where the [plaintiff], having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.").

[28] *Ford Motor Credit Co.* v. *Uresti*, 581 S.W.2d 298 (Tex. Ct. App. 1979); *Kvenild* v. *Taylor*, 594 P.2d 972 (Wyo. 1979); and *In re Estate of McDill*, 14 Cal. 3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975).

government's actions), and sought to represent a different class of customers residing in various *Southern* California counties. The conspiracy alleged in *Brown* related to different markets, with different stores, operated by different personnel, and with different alleged classes of customers from those involved in the *Weinberg* cases.[29]

From the outset, it was respondent's intention to keep his case separate from the *Weinberg* cases. Respondent has represented that it was only "by error" that *Brown I* was filed in the same district court as the *Weinberg* cases.[30] Respondent ultimately broke away from the other cases entirely when he deliberately chose not to appeal from the dismissal of his first complaint. The intensity of the aversion of respondent's counsel to having his cases commingled with the *Weinberg* cases was shown by his dismissal of his Northern California case, *Moitie II*, following the decision of the court of appeals which would have allowed him to join in with the other pending Northern California cases. (J.A. 221.)

Since, in these circumstances, it cannot reasonably be said that respondent's claim is "closely interwoven" with the claims of the *Weinberg* plaintiffs, the factual predicate for the court of appeals' decision simply does not exist.

In any event, the three state court cases relied upon by the court below do not support the contention that

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[29] For these reasons, the court of appeals' statement that *Brown I* had been consolidated with the *Weinberg* cases (J.A. 216) was not only wrong, but impossible.

[30] *See* the Notice of Related Cases filed by respondent's counsel in *Brown I*, *supra*, note 6. Although filed in the Northern District of California, the *Brown I* complaint was captioned "United States District Court for the Central District of California." (J.A. 9.)

the appellate decision in the *Weinberg* cases ought to relieve respondent of the res judicata consequences of the dismissal of *Brown I*.

It is noteworthy that each of the three cases relied on by the court of appeals recognized the "general rule" that:

> [W]here only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the non-appealing parties.[31]

The courts accepted a deviation from this rule in those cases only because the interests of the appealing and nonappealing parties were so inextricably intertwined that the determination of the appealing parties' rights had a direct, unavoidable impact on the rights of the other parties. But the "closely interwoven" relationships of the parties found to exist in those cases do not even remotely resemble the positions held, respectively, by respondent and the *Weinberg* plaintiffs.

For example, in *Ford Motor Credit Co.* v. *Uresti*, *supra*, the holder of an installment sales contract on a vehicle sued two successive purchasers of the vehicle, the first for the balance due on the purchase price and the second for repossession. The second purchaser cross-claimed against the first for the price of the vehicle, in the event he was forced to cede possession to the plaintiff. In the trial court, the plaintiff prevailed against the first purchaser but not against the second; accordingly, the second purchaser's cross-claim was denied as

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[31] *In re Estate of McDill*, 14 Cal. 3d at 840, 537 P.2d at 879, 122 Cal. Rptr. at 759. *See Ford Motor Credit Co.* v. *Uresti*, 581 S.W.2d at 300; *Kvenild* v. *Taylor*, 594 P.2d at 978.

moot. On the plaintiff's appeal, the appellate court ruled that the plaintiff was entitled to repossess the vehicle from the second purchaser. Since the second purchaser's cross-claim was inextricably interwoven with, and directly contingent upon, the claim that was appealed, the Texas court directed the lower court to reconsider the cross-claim.

Similarly, in *Kvenild* v. *Taylor*, *supra*, the Wyoming court reversed a judgment that had been entered erroneously against certain real estate agents and their principal, who had been held jointly and severally liable. Although only the agents appealed, the court reversed as to the principal as well, since the extent of the principal's liability was, in the circumstances presented, inextricably intertwined with, and directly dependent on, the appealing defendants' liability. Otherwise, the principal would have been liable for the full amount of the judgment when, as the court held, the plaintiffs were entitled to no recovery at all.[32]

Finally, *In re Estate of McDill*, *supra*, involved a contest over an estate among competing heirs, the nieces and the cousins of the decendent's spouse. On appeal from a judgment dividing the estate among all the heirs, the California court ruled that only the decendent's two nieces were entitled to the property. It ordered that the property be divided equally between these nieces even though only one of them had appealed. The court so ruled because the nonappealing niece's claim was identical in all respects to that of the appealing niece and because it would have been anomalous for her share of

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[32] The fact that the lower court granted attorneys' fees to the principal against the agents constituted a further element interweaving the rights and liabilities of the appealing and nonappealing parties. *See* 594 P.2d at 978.

the property to be forfeited to the other heirs, whose claims were held to be statutorily barred. No such intimate intermingling of interests joins respondent here to the *Weinberg* plaintiffs.

Unlike the present case, none of the state cases relied upon by the court below involved any attempt to circumvent the court's jurisdiction and judgment by institution of a thinly disguised duplicate action in another forum. Moreover, in each of these state cases there was only a single lawsuit, in which the appellate court granted relief to the nonappealing, as well as appealing, parties. The present situation, by contrast, involved a multiplicity of discrete, separately filed and independent actions. When the plaintiffs in *Brown I* and *Moitie I* decided not to appeal the dismissals of their complaints, their separate actions were not, in whole or in part, before the court of appeals in the *Weinberg* appeals, so that there was neither occasion nor power for the court of appeals to reach out and include them in its judgment. *See Reed* v. *Allen*, 286 U.S. at 198-99. Accordingly, the court of appeals was incorrect in conjecturing that it "could have" reversed the dismissal of *Brown I* (and *Moitie I*) when it reversed the *Weinberg* judgment.

Indeed, even if, *arguendo*, the court of appeals "could have" issued an order in the *Weinberg* appeals affecting the finality of *Brown I* or *Moitie I*, the stark unavoidable fact is that it did not do so. Res judicata demands an end to litigation: if the instant litigation did not end upon respondent's failure to appeal the final judgment dismissing his first complaint, surely it ended — even under the three state court cases relied on by the court of appeals — upon the court of appeals' failure in the *Weinberg* cases to rescue respondent from the consequences of his own tactics.

Respondent's deliberate decision not to appeal the dismissal of his first complaint followed from his basic strategy to keep his case separate from the *Weinberg* actions. He cannot now claim that he should escape the consequences of his tactics on the ground that his action is "closely interwoven" with those cases.

C. There Is a Special Need for Strict Adherence To Res Judicata in Complex, Multiple Actions To Serve as a Check on Abuses by Counsel and To Maintain Judicial Control.

Not only did the court of appeals carve out an impermissible exception to res judicata, but it did so in that very class of cases in which the stabilizing influence of res judicata and other tools of judicial management are most sorely needed. Complex class action litigation, involving a multiplicity of parties and complaints, of the sort typically spawned by government antitrust suits urgently requires effective judicial coordination and control and, therefore, punctilious regard for and adherence to court orders and judgments.

Due largely to the liberalization of the class action device and the incentive of lucrative attorneys' fees, it has now become a certainty that, whenever the government files an antitrust complaint, a multiplicity of private actions for treble damages and attorneys' fees will promptly follow. The phenomenon of multiple actions — often involving different attorneys jockeying for position with respect to litigation tactics, settlements and claims for attorneys' fees — has created a substantial strain on the federal courts and has weakened public confidence in the legal process. *See, e.g.*, Kirkham, "Complex Civil Litigation — Have Good Intentions Gone Awry?", *The Pound Conference*, 70 F.R.D. 199,

205, 207 (1976); 7A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL §1803 at 204 (1979 Supp.); 10 *id.* §2675 at 41 (1979 Supp.). The problems created by the piling on of multiple actions are often exacerbated when one or more of the plaintiffs, like respondent here, files competing actions which differ in one or more significant respects from the matrix government complaint. This practice of attempting to break away from the pack is generally designed to enhance the nonconforming attorney's bargaining position with respect to settlement and attorneys' fees.

Tactics such as those employed by respondent here have been soundly condemned by the courts. For example, in *Three J Farms, Inc.* v. *Alton Box Board Co.*, [1979-1] Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980), the plaintiffs attempted to file in South Carolina state court an action parallel to the *Corrugated Container Antitrust Litigation*, M.D.L. No. 310 (S.D. Tex.). In condemning this maneuver, the court stated:

> The Court is greatly concerned . . . because these actions raise a serious question as to whether the desire to return to the South Carolina State Court is for the benefit of the South Carolina plaintiffs or for the benefit of their attorneys.
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> * * *
>
> However, if plaintiffs wish to harrass the defendants . . . in the hope of obtaining a settlement from the defendants out of economic necessity, they may have chosen the right course of conduct, but

> unfortunately for them, they are before a court which does not plan to cooperate in their venture.

[1979-1] Trade Cas. at 76,549, 76,550.[33]

The court in *Three J Farms* noted that the same attorneys had engaged in the same maneuver in at least one other multiparty antitrust action, *In re Eastern Sugar Antitrust Litigation*, M.D.L. No. 201A (E.D. Pa.). [1979-1] Trade Cas. at 76,549.[34] Similarly, respondent's counsel here has engaged in the same sort of maneuvering in the *Moitie* case previously filed against petitioners and in at least one other action, *In re Beef Industry Antitrust Litigation*, 419 F. Supp. 720 (J.P.M.D.L. 1976).[35]

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[33] Subsequently, the district court in Texas to which the multidistrict container cases had been assigned entered an order enjoining the plaintiffs in *Three J Farms* and their attorneys from proceeding with the subject matter of their complaint in any court other than the federal court for the Southern District of Texas. *In re Corrugated Container Antitrust Litigation*, M.D.L. No. 310 (S.D. Tex., Jan. 16, 1980) (Pretrial Order No. 32). We have lodged a copy of this unpublished order with the Clerk of the Court.

[34] The same tactic of filing a competing state court action was also adopted, unsuccessfully, in *Hughes Construction Co., Inc.* v. *Rheem Mfg. Co.*, 487 F. Supp. 345 (N.D. Miss. 1980) (relating to *In re Water Heater Antitrust Litigation*, M.D.L. No. 379) (parallel suit filed by certain plaintiffs in Chancery Court, Oktibeha, Mississippi).

[35] After the United States District Court for the Northern District of Texas dismissed a number of complaints against various beef retailers, respondent's counsel, instead of appealing like the others adversely affected by that judgment, filed a new action on the same claim in California state court. The state court dismissed this breakaway complaint on grounds of res judicata. *Boccardo* v. *Safeway Stores, Inc.*, No. 733-783 (Super. Ct., Jan. 9, 1979), *appeal docketed*, No. 1 Civ. 47500 (Ct. App. Mar. 2, 1979). (We have lodged this unpublished order with the Clerk of this Court.) The federal court's decision, from which the other plaintiffs appealed,

The appropriate antidote to such disruptive practices is effective judicial control, such as was exercised by the district court here, and not the creation of loopholes in established doctrines of judicial administration, such as that adopted by the court of appeals. Particularly in complex, multiparty actions, individual parties and their counsel simply may not be left at liberty to litigate in one forum and then, upon receiving an unfavorable judgment, to venture off in search of a more hospitable court.

The court of appeals' decision runs counter to the salutary trend of the law toward reducing the burdens on the parties and enhancing the court's ability to coordinate and control complex litigation. *See, e.g.*, 28 U.S.C. §1407 (1976) (coordination of multidistrict litigation). The policy favoring increased judicial control and coordination in complex litigation was recently embraced by Congress in the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (September 12, 1980). That statute empowers the courts to impose the sanction of costs, expenses and attorneys' fees directly upon counsel who "multiply the proceedings in any case unreasonably and vexatiously."[36] The Act

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was subsequently reversed by the court of appeals. *In re Beef Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 101 S. Ct. 280 (1980).

[36] As amended by Pub. L. No. 96-349, §3, 94 Stat. 1154 (1980), the provisions of 28 U.S.C. §1927 are now as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Cf. Roadway Express Inc. v. *Piper*, 100 S. Ct. 2455, 2459-62 (1980).

also makes clear the full applicability of collateral estoppel to Justice Department antitrust cases. Pub. L. No. 96-349, §5(a), 94 Stat. 1154 (amending 15 U.S.C. §16). The purpose of both these amendments was to enhance judicial control and promote finality and certainty in litigation, and to reduce the costs of complex antitrust litigation to the courts and the parties.[37]

These objectives have also been strongly endorsed in the decisions of this Court. In *Reiter* v. *Sonotone*, *supra*, the Court recognized that concerns expressed about the economic and administrative burdens of class action consumers' antitrust cases, such as the one at bar, "are not without substance." 442 U.S. at 345. The Court observed that such actions "need not result in administrative chaos, class-action harassment, or 'windfall' settlements if the district courts exercise sound discretion and use the tools available." *Id.* It is ironic that, in one of the first decisions purporting to rely on *Reiter*, the court of appeals reversed the district court for using one of the most firmly established "tools" for ensuring sound judicial administration, minimizing burdensome duplication and redressing abusive tactical maneuvering — the doctrine of res judicata.

The court of appeals in this case created a gaping exception to the doctrine of res judicata. If allowed to stand, the decision below will further encourage breakaway tactics and other machinations designed to increase the complexity and decrease the manageability of the already troublesome class of multiparty, multiple-complaint proceedings now burdening the federal courts.

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[37] H.R. Conf. Rep. No. 96-1234, 96th Cong., 2d Sess. 8 (1980), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 5209, 5210-11; H.R. Rep. No. 96-874, 96th Cong., 2d Sess. 3, 5 (1980), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 5180, 5181-82, 5183-84.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals in this case should be reversed and the complaint should be dismissed on grounds of res judicata.

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APPENDIX

APPENDIX A

Comparison of Complaint Allegations

Allegations of the *Brown II* Complaint (J.A. 93) and the *Moitie II* Complaint (R. 167) which, except as noted below, are verbatim copies of allegations contained in the *Brown I* (J.A. 9) and *Moitie I* Complaints (R. 9):

(i) Class action allegations: *Moitie II,* ¶ I (1 & 2), *Moitie I,* ¶ I; *Brown II,* ¶ I (1 & 2), *Brown I,* ¶ I (3). The class action allegations in *Brown II* are identical to those in *Brown I* except for (a) a slight modification in the first sentence and (b) the inclusion of four additional Los Angeles area counties in the *Brown II* Complaint.

(ii) Description of the plaintiffs: *Moitie I* and *II,* ¶ II; *Brown I* and *II,* ¶ II.

(iii) Description of the defendants: *Moitie I* and *II,* ¶ III; *Brown I* and *II,* ¶ III. The only difference between these allegations in the *Brown I* and *II* Complaints is that the former alleged that Federated did business under the name of "Bullock's Southern California" with its principal offices in Los Angeles, while the latter substitutes the name "Bullock's" and alleges that its principal offices are in Palo Alto.

(iv) Description of "Does": *Moitie I* and *II,* ¶ IV. No "Does" were alleged in the *Brown I* Complaint, but the "Doe" allegation in *Brown II* is a verbatim copy of the "Does" paragraph in *Moitie I.*

(v) Description of agents and co-conspirators: *Moitie I* and *II,* ¶ V; *Brown II,* ¶ V; *Brown I,* ¶ IV.

(vi) Description of the trade and commerce allegedly affected: *Moitie I* and *II,* ¶ VI; *Brown II,* ¶ VI; *Brown I,* ¶ V.

(vii) Statement of the "offenses charged," *i.e.*, the basic allegations of the alleged wrong committed by defendants against the plaintiffs: *Moitie I* and *II,* ¶ VII; *Brown II,* ¶ VII; *Brown I,* ¶ VI.

(viii) Statement of the alleged "effects" of the defendants' alleged "offenses": *Moitie I* and *II* and *Brown II,* ¶ VIII.*

(ix) Statement of the alleged injury to the plaintiffs: *Moitie I* and *II,* ¶ IX; *Brown II,* ¶ IX; *Brown I,* ¶ VII.

(x) Allegations of fraudulent concealment: *Moitie I* and *II,* ¶ X; *Brown II,* ¶ X; *Brown I,* ¶ VIII.

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* No "effects" were alleged in *Brown I,* but this allegation in *Brown II* is essentially a verbatim copy of the "effects" paragraph in *Moitie I* which was in turn a verbatim copy of the "effects" paragraph in the government's complaint. *United States* v. *Federated Dept. Stores, Inc., et al.,* No. C-76-858-RHS, Complaint ¶ VI. While there were three "effects" alleged in the government complaint and *Moitie I* (subparagraphs a, b & c), only the first two of these are copied in *Moitie II* and *Brown II.*